

# FEDERAL CONSISTENCY REQUIREMENTS\*

July 31, 2003

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## INTRODUCTION

The Coastal Zone Management Act (CZMA) was enacted on October 27, 1972, to encourage coastal States, Great Lake States, and United States Territories and Commonwealths (collectively referred to as coastal States) to develop management programs to manage and balance competing uses of and impacts to coastal resources. The CZMA is an important law implementing the concept of federalism and emphasizes the primacy of State decision making regarding the coastal zone. Section 307 of the CZMA (16 USC § 1456), called the Federal Consistency provision, is a major incentive for States to join the national coastal management program and is a powerful tool that States use to manage coastal uses and resources and to facilitate cooperation and coordination with Federal agencies.

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\* For further information contact David W. Kaiser, Federal Consistency Coordinator, Office of Ocean and Coastal Resource Management, NOAA, 1305 East-West Highway, 11th Floor (N/ORM3), Silver Spring, MD 20910. Phone: 301-713-3155, ext 144. Fax: 301-713-4367. david.kaiser@noaa.gov

See OCRM's Federal Consistency web page for additional information:

[http://coastalmanagement.noaa.gov/czm/federal\\_consistency.html](http://coastalmanagement.noaa.gov/czm/federal_consistency.html)

Federal Consistency reviews are the responsibility of the lead State agency that implements or coordinates the State's federally approved Coastal Management Program (State CMP or CMP). At the federal level, the Office of Ocean and Coastal Resource Management (OCRM), within the National Oceanic and Atmospheric Administration's (NOAA's) National Ocean Service, among other duties and services, interprets the CZMA and oversees the application of Federal Consistency; provides management and legal assistance to coastal States, Federal agencies, Tribes and others; and mediates CZMA related disputes. NOAA's Office of General Counsel for Ocean Services assists OCRM and processes appeals to the Secretary of Commerce.

The purpose of this document is to provide a brief overview of Federal Consistency. For more detailed information and to fully comply with CZMA requirements, *see* CZMA section 307 (16 USC § 1456) and NOAA's Federal Consistency regulations, 15 CFR part 930.

Recent revisions to the regulations were promulgated at 65 *Federal Register* 77123-77175 (December 8, 2000), and were published in the Code of Federal Regulations on January 1, 2001. The new rules took effect on January 8, 2001. The preamble to the final rule published on December 8, 2000, also contains substantial information regarding Federal Consistency. The Conference Report to the 1990 amendments to the CZMA (Pub. L. No. 101-508) is a primary legislative source for some of the revisions to the regulations. The Conference Report is discussed in the preamble to the December 8, 2000, final rule and can also be located at, H.R. Conf. Rep. No. 964, 101<sup>st</sup> Cong., 2d Sess., 970-972 (Conference Report).

## DEFINITION

Federal Consistency is the CZMA requirement that ***federal actions*** that have reasonably foreseeable ***effects*** on any ***land or water use*** or ***natural resource*** of the coastal zone (also referred to as coastal uses or resources, or coastal effects) must be consistent with the ***enforceable policies*** of a coastal State's federally approved CMP.

### Federal actions:

1. ***Federal agency activities*** -- activities and development projects performed by a Federal agency, or a contractor for the benefit of a Federal agency.

E.g., Fisheries Plans by the National Marine Fisheries Service, Naval exercises, the disposal of federal land by the General Services Administration, a U.S. Army Corps of Engineers (Corps) breakwater or beach renourishment project, an outer continental shelf (OCS) oil and gas lease sale by the Minerals Management Service (MMS), improvements to a military base, Naval disposal of radioactive or hazardous waste performed by a private contractor, activities in National Parks such as installation of mooring buoys or road construction;

2. ***Federal license or permit activities*** -- Activities not performed by a Federal agency, but requiring federal permits, licenses or other forms of federal approval.

E.g., activities requiring Corps 404 permits, MMS approvals for OCS oil and gas plans, Corps permits for use of ocean dump-sites, Nuclear Regulatory Commission licenses for nuclear power plants, licenses from the Federal Energy Regulatory Commission (FERC) for hydroelectric facilities;

3. ***Federal financial assistance to State and local governments.***

E.g., Federal Highway Administration funds to coastal state and local governments, construction grants for wastewater treatment works, hazardous waste management trust fund, Housing and Urban Development grants.

**Effects:**

At the heart of Federal Consistency is the “effects test.” The CZMA was amended in 1990 to,

establish[] a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to [the consistency requirement] if it will ***affect*** any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement.

Conference Report at 970. The new effects language was added to replace previous language that referred to activities “directly affecting the coastal zone.” It also reflects Congressional intent to overturn *Secretary of the Interior v. California*, 464 U.S. 312 (1984), and further to:

eliminate “categorical exemptions” from consistency, and instead to establish a uniform threshold standard requiring federal agencies to make a case-by-case factual determination of reasonably foreseeable effects on the coastal zone. The amendments to section 307(c)(1) were intended to leave no doubt that all federal agency activities meeting the “effects” standard are subject to the CZMA consistency requirement; that there are no exceptions or exclusions from the requirement as a matter of law; and that the new “uniform threshold standard” requires a factual determination, based on the effects of such activities on the coastal zone, to be applied on a case-by-case basis.

Id. at 970-71; 136 Cong. Rec. H 8076 (Sep. 26, 1990). The Conference Report provides further clarification as follows:

The question of whether a specific federal agency activity may affect any natural resource, land use, or water use in the coastal zone is determined by the federal agency. The conferees intend this determination to include effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term “affecting” is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

These concepts are key to the effectiveness of the CZMA to allow States to balance resource protection with development in the coastal zone and are embodied in the revised Federal Consistency regulations.

**Enforceable policies:** An enforceable policy is a State policy that is legally binding under State law (e.g., through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions), and by which a State exerts control over private and public coastal uses and resources, and which are incorporated in the State’s federally approved CMP.

**Coastal uses:** Coastal uses include such activities as: public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas, floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects, etc.

**Coastal resources:** Coastal resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, and reptiles, etc.

## **BENEFITS**

Federal Consistency is an important mandatory, but flexible mechanism to foster consultation, cooperation, and coordination between States and Federal agencies. Federal consistency is more than just a procedural dictate. It helps ensure the balanced use and protection of coastal resources through State CMP policies.

To maximize the benefits of Federal Consistency, Federal agencies need to provide routine notification to coastal States of actions affecting the coastal zone, and coastal States need to pay attention to proposed federal actions, develop adequate consistency procedures, and notify Federal agencies, other State agencies, and others of a State's assertion of consistency. If a CMP is not receiving notice of federal activities affecting the coastal zone, then the CMP needs to address this issue with each Federal agency. States need to make connections with the Federal agencies, inform them of the Federal Consistency requirements, possibly develop memoranda of understanding (MOUs), ensure that the CMP obtains notice, and respond when the CMP does receive notice. In summary, Federal agencies and others have an affirmative duty to comply with the Federal Consistency requirements, but States need to take consistent and assertive steps.

Federal consistency provides Federal agencies with an effective mechanism to document coastal effects and to address State coastal management concerns. Moreover, compliance with the consistency requirement complements National Environmental Policy Act (NEPA) requirements. Even though the CZMA effects test is different than NEPA's and the CZMA requires Federal agencies to alter projects to be consistent with State CMP policies, NEPA is an effective delivery mechanism for Federal Consistency and often provides necessary background information.

Early attention to Federal Consistency can provide the Federal agency with State CMP and public support and a smooth and expeditious federal consistency review. Early consultation and cooperation between Federal agencies and State CMPs can help Federal agencies avoid costly last minute changes to projects in order to comply with State CMP policies. For example, to avoid issues on specific projects, the Alaska CMP and MMS developed an MOU that specifies the process for consistency reviews of OCS oil and gas lease sales and approvals, and Alaska and the Forest Service established a similar MOU for Timber Sales.

States concur with approximately 93-95% of all federal actions reviewed. Maintaining this percentage means that States and Federal agencies need to know their consistency responsibilities and to develop cooperative relationships to foster effective coordination and consultation.

## NATIONAL INTEREST SAFEGUARDS

Federal Consistency gives States substantial input into federal actions affecting the coastal zone. There are, however, safeguards which balance the need to ensure consistency for federal actions affecting the coastal zone and the importance of federal activities. These safeguards include:

**Federally approved programs and State CMP enforceable policies.** State CMPs and their enforceable policies must be approved by NOAA after substantial input by Federal agencies and other interested parties. Likewise, when a State modifies its CMP or seeks to add a new enforceable policy, NOAA must approve the program change after providing the opportunity for input from Federal agencies and others.

**Consistency must be based on coastal effects.** While the Federal Consistency effects test covers a wide range of federal actions, States only review federal actions that have reasonably foreseeable coastal effects. For Federal agency activities, Federal agencies make this determination of effects. For federal license or permit activities and federal financial assistance activities, OCRM makes the determination of effects by approving the *lists* of federal approvals and financial assistance programs that a State wishes to include in its CMP. In order to be on the list, the federal approval or funding program must have coastal effects in most cases. Federal agencies and other interested parties have input into OCRM's approval of such lists and additions to the lists. If a State wishes to review an *unlisted* federal license or permit activity, it must notify the applicant and the Federal agency and seek OCRM approval to review the activity. OCRM's decision is based on whether the unlisted activity will have reasonably foreseeable coastal effects and, again, OCRM seeks input from the Federal agency and the applicant.

**Consistent to the maximum extent practicable (Federal agency activities).** Requires Federal agency activities (CZMA § 307(c)(1)) to be fully consistent unless federal legal requirements prohibit full consistency. This ensures that Federal agencies are able to meet their legally authorized mandates, even though the activity may not be consistent with a State's enforceable policy. If a Federal agency has the discretion to meet a State's enforceable policy, then it needs to be consistent with that policy. However, federal law may limit a Federal agency's discretion and, thus, a Federal agency's administrative record may dictate an action that is not fully consistent with a State's policy. A Federal agency may also deviate from full consistency due to "exigent circumstances." An exigent circumstance is an emergency or emergency-like or unexpected situation requiring the Federal agency to take quick or immediate action.

Consistent to the maximum extent practicable and exigent circumstances refers to consistency with a State CMP's substantive requirements as well as the procedural requirements of NOAA's regulations. There may be times that a federal legal requirements or an emergency situation requires a Federal agency to act sooner than the end of the 90-day consistency period. In such cases, the Federal agency needs to consult with the State CMP as early as possible.

A Federal agency cannot use a lack of funds as a basis for being consistent to the maximum extent practicable. Thus, Federal agencies are encouraged to consult early with State CMPs to ensure that the Federal agency has budgeted for meeting State CMP enforceable policies.

A Federal agency may also proceed over a State's objection when the Federal agency determines that it is *fully* consistent with the State's enforceable policies. 15 CFR § 930.43(d).

**Appeal State objection to Secretary of Commerce (Non-Federal only).** Non-federal applicants for federal license or permits and State and Local government applicants for federal financial assistance may appeal a State's objection to the Secretary of Commerce. If the appellant meets certain grounds, the Secretary will override the State's objection, allowing the Federal agency to issue its approval or funding.

**Presidential exemption (Federal agency activities).** The CZMA provides, that under a specific set of circumstances, the President may exempt a specific Federal agency activity from compliance with State enforceable policies. CZMA § 307(c)(1)(B).

**Mediation by the Secretary or OCRM.** Federal agencies and States may request the Secretary of Commerce to mediate serious disputes. OCRM is also available to mediate between Federal agencies and States, as well as with other parties. OCRM mediation has been used to resolve disputes between States and Federal agencies.

## **BASIC FEDERAL CONSISTENCY PROCEDURES**

Two important things to keep in mind to facilitate consistency reviews is for the Federal agency, State CMP, and applicant to discuss a proposed activity as early in the process as possible, and that State CMPs and Federal agencies can agree, at any time, to more flexible consistency review procedures (providing public participation requirements are still met).

*See Appendix A for a chart summary of the consistency requirements, and Appendices B and C for flow charts for Federal agency activities and Federal license or permit activities.*

## **Federal Agency Activities and Development Projects**

Federal agencies proposing an activity need to follow the requirements of CZMA section 307(c)(1), (2)(16 USC § 1456(c)(1), (2)) and 15 CFR part 930, subparts A, B and C, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

1. Federal development projects inside the coastal zone are automatically subject to consistency and require a Consistency Determination.
2. Federal agency determines if federal activity (in or outside coastal zone) and development projects outside coastal zone will have reasonably foreseeable coastal effects. States are encouraged to list activities that are expected to affect coastal uses or resources in their approved CMPs, and to monitor unlisted activities and to notify Federal agencies when an unlisted activity requires consistency review. However, the listing/unlisted provisions in NOAA's regulations are recommended procedures for facilitating State-Federal coordination. Whether or not an activity is listed, it is the Federal agency's responsibility to provide State CMPs with Consistency Determinations for Federal agency activities affecting the coastal zone.
3. The Federal agency should contact the State CMP at the earliest possible moment in the planning of the activity to ensure early State-Federal coordination and consultation.
4. If coastal effects are reasonably foreseeable, then Federal agency submits a Consistency Determination to State CMP at least 90 days before activity starts. While the form of the Consistency Determination may vary, it must include a detailed description of the proposed activity, its expected coastal effects, and an evaluation of the proposed activity in light of the applicable enforceable policies in the State's CMP.

5. If no effects, Federal agency may have to provide a Negative Determination.
6. State CMP has 60 days (plus appropriate extensions) to concur with or object to the Federal agency's consistency determination.
7. The State CMP must provide for public comment on the State's consistency review. The State cannot rely on the Federal agency notice, unless the Federal agency notice specifically says that comments on the ***State CMP's consistency review*** should be sent to the State CMP agency.
8. State concurrence presumed if State does not meet time frames.
9. If the State CMP agrees with the Consistency Determination, then the Federal agency may immediately proceed with the activity. If the State objects, then the State's objection must describe how the proposed activity is inconsistent with enforceable CMP policies. In the event of an objection, the State CMP and Federal agency should attempt to resolve any differences during the remainder of the 90 day period. If resolution has not been reached at the end of the 90 day period the Federal agency should consider postponing final federal action until the problems have been resolved. However, at the end of the 90 day period the Federal agency may, notwithstanding State CMP objection, proceed with the activity only if the Federal agency clearly describes, in writing, to the State CMP the specific legal authority which limits the Federal agency's discretion to comply with the State CMP's enforceable policies.
10. If dispute between Federal agency and State CMP, either party may seek mediation by OCRM or the Secretary of Commerce (the Secretary's mediation is more formal).

### **Federal License or Permit Activities**

A private individual or business, or a state or local government agency, or any other type of non-federal entity, applying to the federal government for a required permit or license or any other type of an approval or authorization, needs to follow the requirements of CZMA section 307(c)(3)(A)(16 USC § 1456(c)(3)(A)) and 15 CFR part 930, subparts A, B and D, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

1. State CMP, with OCRM approval, determines effects:
  - a. listed v. unlisted activity.
  - b. inside v. outside coastal zone.

All federal license or permit activities occurring in the coastal zone are deemed to affect coastal uses or resources, if the State CMP has "listed" the particular federal license, permit, or approval in its federally approved CMP document.

For a *listed* activity occurring *in the coastal zone*, the applicant must submit a Consistency Certification to the approving Federal agency and the State CMP. In addition to the Certification, the applicant must provide the State with the necessary data and information to allow the State to assess the project's effects. This information will usually be contained in the applicant's application to the Federal agency, but may include other information required by the State CMP, if the information requirement is *specifically included in the State's federally approved CMP document*.

For *listed* activities, *outside the coastal zone*, the applicant must submit a Consistency Certification to the State CMP and the Federal agency if the activity falls within the *geographic location* described in the State CMP document for listed activities outside the coastal zone. For listed activities outside the coastal zone where the State has *not* described the geographic location, the State CMP must follow the unlisted activity procedure described above, if it wants to review the activity.

An applicant may also be required to submit a Consistency Certification to the State CMP for *unlisted activities*. For unlisted activities, in or outside the coastal zone, the State CMP must notify the applicant, the relevant Federal agency, and OCRM that it intends to review the activity. OCRM must approve the State's consistency review. The State CMP must make this notification within 30 days of receiving notice of the activity, otherwise the State waives its consistency rights. The waiver does not apply where the State CMP does not receive notice (notice may be actual or constructive so long as it is adequate). The applicant and the Federal agency have 15 days from receipt of the State CMP's request to provide comments to OCRM. OCRM will make a decision usually within 30 days of receipt of the State's request. The basis for OCRM's decision will be whether the proposed activity can be reasonably expected to affect any land or water use or natural resource of the coastal zone. The Federal agency may not approve the activity until the consistency process is complete.

2. Applicant for any required federal approval must submit a Consistency Certification and necessary data and information to the State CMP.
3. State CMP has six months to respond, but must notify applicant if review will go beyond three months.
4. The State must provide for public comment (State can require applicant to publish notice or may combine notice with Federal agency, if Federal agency agrees).
5. State concurrence presumed if State does not meet time frames.
6. If State objects, Federal agency cannot issue approval.
7. Applicant may renegotiate with State to remove State's objection or appeal the State's objection to the Secretary of Commerce within 30 days of the objection. If the Secretary overrides the State's objection, the Federal agency may approve the project.

### **OCS Plans**

A private person or business applying to the U.S. Department of the Interior's Minerals Management Service (MMS) for outer continental shelf (OCS) exploration, development and production activities needs to follow the requirements of CZMA section 307(c)(3)(B)(16 USC § 1456(c)(3)(B)) and 15 CFR part 930, subparts A, B and E, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

1. Any person who submits to MMS an OCS plan for the exploration of, or development and production of, any area leased under the Outer Continental Shelf Lands Act, must certify to the relevant State CMPs that any activities described in detail in such OCS plans will be conducted in a manner consistent with the State CMPs. The process and requirements for this section generally mirror those of federal license or permit activities discussed above. State must notify applicant if State review will extend beyond three months, otherwise State's concurrence is presumed.

### **Federal Financial Assistance Activities**

A state agency or local government applying for federal financial assistance needs to follow the requirements of CZMA section 307(d)(16 USC § 1456(d)) and 15 CFR part 930, subparts A, B and F, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

1. States list in their CMPs the federal financial assistance activities subject to review. The State CMP may also notify an applicant agency and Federal agency that it will review an unlisted activity. OCRM approval is not required for the review of unlisted federal financial assistance



- activities.
2. NOAA regulations allow State CMPs to develop flexible procedures for reviewing and concurring with federal assistance activities. State CMP review of the activities is normally conducted through procedures established by States pursuant to Executive Order 12372 -- intergovernmental review of federal programs, or through State clearinghouse procedures.
  3. Federal agency may not issue the funding until State CMP has concurred.
  4. State or local government applicant agency may appeal State objection to the Secretary of Commerce who may override the State's objection.

### **Other Federal Actions**

A federal action that will have reasonably foreseeable coastal effects, but which does not fall under 15 CFR part 930, subpart D (federal license or permit), subpart E (OCS plans), or subpart F (financial assistance to state agency or local government), is a Federal agency activity under subpart C. For example, if a Federal agency is providing funds to a private citizen for disaster relief from a hurricane, and the funds will be used for an activity with coastal effects, then the Federal agency must follow the requirements for Federal agency activities and provide the State CMP with a Consistency Determination.

### **Mediation of Disputes**

In the event of a serious disagreement between a State CMP and a Federal agency, either party may request that the Secretary of Commerce mediate the dispute. All parties must agree to participate, agreement to participate is non-binding, and either party may withdraw from the mediation at any time. Secretarial mediation is a formal process that includes a public hearing, submission of written briefs, and meetings between the parties. A hearing officer, appointed by the Secretary, will propose a solution. Secretarial mediation is only for States and Federal agencies. Exhaustion of the mediation process is not a prerequisite to judicial review.

The availability of Secretarial mediation or litigation does not preclude the parties from informally mediating the dispute through OCRM or another facilitator. OCRM has successfully mediated disputes and offers its good offices to resolve conflicts. Most disputes are addressed through this informal method. Either party may request OCRM involvement, and participation is non-binding.

### **Appeals to the Secretary of Commerce**

The CZMA provides an administrative appeal to the Secretary of Commerce from a consistency objection by a coastal State. In the case of a federal license or permit, an OCS oil and gas plan, or an application for federal financial assistance, the applicant may request that the Secretary override the State's consistency objection if the activity is consistent with the objectives of the CZMA (Ground I), or is otherwise necessary in the interest of national security (Ground II). 16 USC § 1456(c)(3)(A),(B), and (d). Secretary appeals are not available for Federal agency activities. The requirements for appeals are found at 15 CFR part 930, subpart H, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

If the requirements of either Ground I or Ground II are met, the Secretary overrides the State's objection. The Secretary's inquiry into whether the grounds for an override have been met is based upon an administrative record developed for the appeal. While the Secretary will review the State objection for CZMA compliance, e.g., whether the objection is based on enforceable policies, the Secretary does not review the objection for compliance with State laws and policies.

If the Secretary overrides the State's objection the authorizing Federal agency may permit or fund the activity. A secretarial override does not obviate the need for an applicant to obtain any State permits or authorizations. Factors influencing the appeal process time include: nature and complexity of the dispute, stays requested by one of the parties, public hearings, and briefing schedules.

The Secretary appeal process is final Federal agency action under the Administrative Procedure Act and is a necessary administrative action prior to litigation. *See* Appendix D for a list of CZMA Secretarial override decisions and decisions on OCS activities.

### **Interstate Consistency**

The regulations were revised to provide a process for a coastal State to review a federal action occurring in another State that will have coastal effects in the reviewing coastal State. The new requirements combine with the requirements under the various types of federal actions. The interstate regulations are found at 15 CFR part 930, subpart I, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

### **Information that Should Be in State Objection Letters**

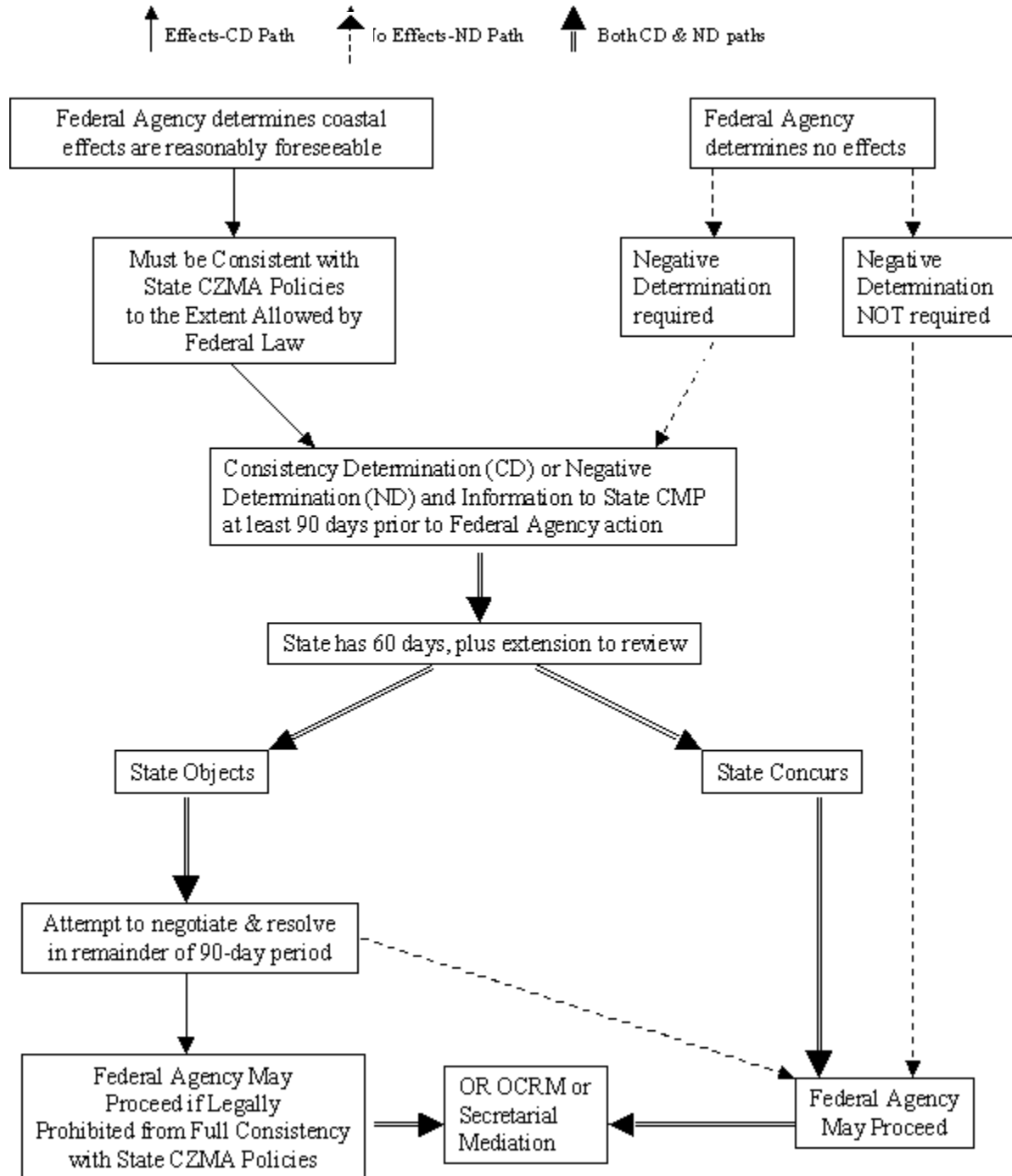
State objection letters under the CZMA Federal Consistency regulations should include the following information:

1. The objection (or conditional concurrence) must be based on enforceable policies that are part of the State's federally approved CMP.
2. The objection letter must describe *how* the activity is inconsistent with specific enforceable policies.
3. The objection must be timely. An objection letter should include the date the complete Consistency Certification or Consistency Determination and necessary information was received by the State. The State's objection letter should also include the date that the State provided a three-month notice to the applicant for a federal license or permit activity describing the status of the State's review.
4. For federal license or permit activities, OCS oil and gas plans, or financial assistance activities, the objection letter must advise the applicant, person or applicant agency, of the right to appeal the state's objection to the U.S. Secretary of Commerce within 30 days of receipt of the letter.
5. If the objection is based on insufficient information, the objection letter must describe the nature of the information requested and the necessity of having that information to determine consistency.
6. An objection letter should include alternatives that would be consistent with the State's CMP enforceable policies. Consistent alternatives should be described with as much specificity as possible to allow the applicant, or the Secretary of Commerce, to determine if the alternatives are available and reasonable.
7. The objection letter must be sent to the applicant, the appropriate Federal agency, and the Director of OCRM.

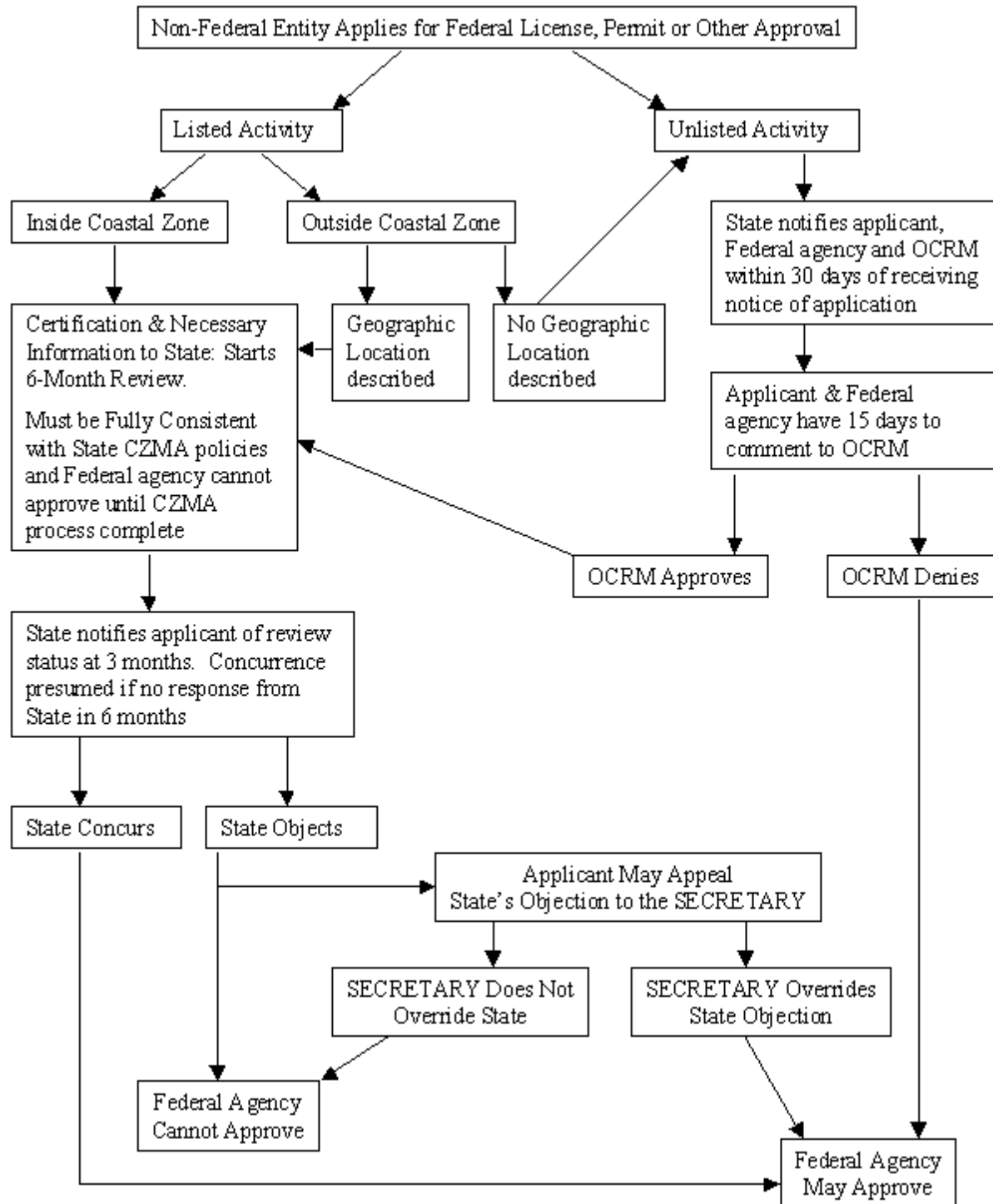
### Appendix A: Summary of Federal Consistency Provisions

	Federal Agency Activities & Development Projects	Federal License or Permit Activities	OCS Plans: Exploration Development & Production	Federal Assistance to State and Local Govts.
CZMA Section 307	(c)(1)&(2)	(c)(3)(A)	(c)(3)(B)	(d)
Activity subject to review, if it ...	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone
Consistency requirement	Consistent to maximum extent practicable with state CMP enforceable policies	Consistent with state CMP enforceable policies	Consistent with state CMP enforceable policies	Consistent with state CMP enforceable policies
Who decides effects?	Federal agency	State CMP and OCRM	State CMP and OCRM	State CMP and OCRM
Time limit	60 days, plus 15 day extension	6 months	3 months - state may extend to 6 months	Clearinghouse schedule
Impact of State Objection	Federal agency may proceed only if cite legal authority as to why it must proceed despite inconsistency	Federal agency may not issue permit, license, or other approval	Federal agency may not approve plan or issue permits	Federal agency may not grant assistance
Administrative conflict resolution	Mediation by the Secretary of Commerce or OCRM (voluntary, non-binding)	Appeal to the Secretary to override State objection	Appeal to the Secretary to override State objection	Appeal to the Secretary to override State objection

**Appendix B: Federal Agency Activities Flow Chart  
(CZMA § 307(c)(1); 15 CFR part 930, subpart C)**



**Appendix C: Federal License or Permit Activities Flow Chart  
(CZMA § 307(c)(3)(A); 15 CFR part 930, subpart D)**



## **Appendix D: Coastal Zone Management Act (CZMA) Secretarial Override Decisions -- July 25, 2003**

Under the CZMA section 307 Federal Consistency provision, proposed federal actions with effects on any coastal use or resource must be consistent with the enforceable policies of federally approved State Coastal Management Programs (CMPs). Under CZMA sections 307(c)(3) and (d), non-federal applicants for federal licenses, permits and other forms of federal approval, and federal financial assistance, must submit certifications to State CMPs, for activities that have coastal effects. If the State CZMA agency objects to the certification, the non-federal applicant may appeal the State's objection to the Secretary of Commerce. The Secretary must override the State's objection if the Secretary finds that the activity is consistent with the objectives of the CZMA or is necessary in the interests of national security. If the Secretary overrides the State's objection, then the Federal permitting/funding agency may issue its approval or funding. If the Secretary does not override the State's objection, the Federal agency cannot issue its approval or funding. The Secretary's decision is based on the administrative record compiled for the appeal from the parties, other Federal agencies and the public. The regulations describing the Secretarial Override process and decision-making criteria can be found at 15 CFR part 930, subpart H.

There are 34 federally approved State CMPs (35 coastal States are eligible). Since approval of the first State CMP in the late 1970's, thousands of Federal agency activities, federal license or permit activities, outer continental shelf (OCS) oil and gas activities, and federal financial assistance activities have been reviewed for consistency with State CMPs. States have concurred with approximately 95% of all federal actions reviewed, while at the same time using consistency to affect important changes to these actions to ensure consistency with the State programs. Of the States' objections, there have been only 40 Secretarial decisions (some appeals are not decided as appellant's sometimes withdraw their appeals or the appellant and State negotiate a settlement).

The Secretary's decisions are listed below, followed by a breakdown of OCS oil and gas decisions. For more information on the Secretarial appeal process or the Secretary's Decisions, please contact:

Office of the Assistant General Counsel for Ocean Services  
National Oceanic and Atmospheric Administration  
1305 East-West Highway, Suite 6111  
Silver Spring, Maryland 20910  
301-713-2967

For general CZMA Federal Consistency questions contact:

David W. Kaiser, Federal Consistency Coordinator  
Office of Ocean and Coastal Resource Management  
1305 East West Highway, Room 11208  
Silver Spring, Maryland 20910 301-713-3155, x144

<b>CZMA Secretarial Appeal Decisions -- July 25, 2003</b>				
<b>Appellant &amp; Project, Federal Agency</b>	<b>State</b>	<b>Appeal Filed</b>	<b>Decision Date</b>	<b>Disposition</b>
1. Exxon (SYU) Development & Production Plan, MMS	CA	7/22/83	2/18/84	Decision delayed/Partial Findings CA ok with platforms, but obj. to Offshore Transportation and Transit. Upheld State b/c pipeline alternative.
2. Ford S. Worthy, Jr. Commercial marina, Corps § 10	NC	8/5/83	5/9/84	Did Not Override State Objection Effects outweigh national interest
3. Union Oil Company of California Exploration Plan, MMS	CA	12/12/83	11/9/84	Override State's Objection National interest outweigh effects
4. Exxon (SRU) (Santa Rosa) Exploration Plan, MMS	CA	3/9/84	11/14/84	Did Not Override State Objection Available alternative to drill outside Thresher Shark season.
5. Southern Pacific Transportation Co. R.R. Bridge/wetland fill, Corps 404	CA	10/23/84	9/24/85	Override State's Objection National interest outweigh effects
6. Gulf Oil Corporation Exploration Plan, MMS	CA	3/13/85	12/23/85	Override State's Objection National interest outweigh effects
7. Long Island Lighting Company Wetland fill for Nuclear Plant, Corps	NY	11/19/86	2/26/88	Override State's Objection National interest outweigh effects
8. John K. DeLyser Dock & Boathouse, Corps § 10	NY	1/6/87	2/26/88	Did Not Override State Objection Not further CZMA objectives
9. Korea Drilling Company, Ltd. Exploration Plan, MMS & NPDES, EPA	CA	12/15/86	1/19/89	Override State's Objection National interest outweigh effects
10. John Bianchi Restaurant pier, Corps § 10	NY	9/5/85	1/25/89	Did Not Override State Objection Alternative available
11. Texaco, Inc. Exploration Plan, MMS & NPDES, EPA	CA	3/23/88	5/10/89	Override State's Objection National interest outweigh effects
12. Exxon Service Station Wetland fill for gas station, Corps 404	NJ	1/7/87	6/14/89	Did Not Override State Objection Effects outweigh national interest
13. Amoco Production Company Exploration Plan, MMS	AK	4/3/89	7/20/90	Override State's Objection National interest outweigh effects
14. Michael P. Galgano Wetland fill for bulkhead, Corps 404	NY	7/14/88	10/29/90	Did Not Override State Objection Effects outweigh national interest

<b>CZMA Secretarial Appeal Decisions -- July 25, 2003</b>				
<b>Appellant &amp; Project, Federal Agency</b>	<b>State</b>	<b>Appeal Filed</b>	<b>Decision Date</b>	<b>Disposition</b>
15. Chevron U.S.A., Inc. Exploration Plan, MMS & NPDES, EPA	CA	7/5/88	10/29/90	Did Not Override State Objection Alternative available re: air impact
16. Shickrey Anton Wetland fill, Corps 404	SC	10/2/89	5/21/91	Did Not Override State Objection Effects outweigh national interest
17. Sucesión Alberto Bachman Swimmer's barrier, Corps 404	PR	3/18/88	10/10/91	Did Not Override State Objection Alternative available
18. José Pérez-Villamil 125 ft pier, Corps § 10	PR	8/16/89	11/20/91	Did Not Override State Objection Effects outweigh national interest
19. Asociación de Propietarios de Los Indios - Houses/bulkheads, Corps	PR	9/26/88	2/19/92	Did Not Override State Objection Not further CZMA objectives
20. Davis Heniford Wetland fill/grocery store, Corps 404	SC	9/24/90	5/21/92	Did Not Override State Objection Effects outweigh national interest Available alternative
21. Yeamans Hall Club Wetland fill/dam & pond, Corps 404	SC	9/25/90	8/1/92	Did Not Override State Objection Alternative available
22. Roger W. Fuller Dredge&fill to increase lot, Corps 404	NC	12/7/89	10/2/92	Did Not Override State Objection Effects outweigh national interest
23. Claire Pappas Restaurant deck, Corps § 10	NY	3/13/90	10/26/92	Did Not Override State Objection Alternative available
24. A. Elwood Chestnut Wetland fill for livestock, Corps 404	SC	8/14/89	11/4/92	Did Not Override State Objection Effects outweigh national interest Alternative available
25. Robert E. Harris 75 ft dock/18 boat slips, Corps § 10	NY	10/26/90	12/2/92	Did Not Override State Objection Effects outweigh national interest Alternative available
26. Henry Crosby Wetland fill for pond, Corps 404	SC	10/17/89	12/29/92	Did Not Override State Objection Effects outweigh national interest
27. Mobil Exploration & Producing U.S. Inc., (Pulley Ridge) Exploration Plan, MMS	FL	1/11/89	1/7/93	Did Not Override State Objection Effects outweigh national interest
28. Union Exploration Partners, Ltd, (Unocal Pulley Ridge) Exploration Plan, MMS	FL	12/21/88	1/7/93	Did Not Override State Objection Effects outweigh national interest



<b>CZMA Secretarial Appeal Decisions -- July 25, 2003</b>				
<b>Appellant &amp; Project, Federal Agency</b>	<b>State</b>	<b>Appeal Filed</b>	<b>Decision Date</b>	<b>Disposition</b>
29. Chevron (Destin Dome-Exploration) Exploration Plan, MMS	FL	3/27/91	1/8/93	Overrode State's Objection National interest outweigh effects
30. Jorge L. Guerrero-Calderon Pier, Corps § 10	PR	3/17/89	3/5/93	Did Not Override State Objection Effects outweigh national interest
31. Carlos A. Cruz Colón Pier, Corps § 10	PR	8/26/91	9/27/93	Did Not Override State Objection Alternative available
32. Virginia Electric and Power Company (Lake Gaston) 90 mile long water pipeline, FERC	NC	10/3/91	5/19/94	Overrode State's Objection National interest outweigh effects No alternative available
33. Mobil Oil Exploration & Producing Southeast, Inc. (Mobil Manteo) NPDES/drilling discharge, EPA	NC	7/31/90	9/2/94	Did Not Override State Objection Inadequate information
34. Mobil Oil Exploration & Producing Southeast, Inc. (Mobil Manteo) Exploration Plan, MMS	NC	12/3/90	9/2/94	Did Not Override State Objection Inadequate information
35. Olga Vélez Lugo Dock/boat ramp, Corps § 10	PR	7/9/92	9/9/94	Did Not Override State Objection Effects outweigh national interest
36. Mobil Exploration & Producing U.S. Inc. (Mobil Pensacola) Exploration Plan, MMS	FL	4/29/92	6/20/95	Overrode State's Objection National interest outweigh effects
37. Vieques Marine Laboratories Aquaculture, Corps § 10	PR	4/29/94	5/28/96	Did Not Override State Objection Effects outweigh national interest
38. Jessie W. Taylor Wetland fill/mini storage, Corps 404	SC	4/10/96	12/30/97	Overrode State's Objection National interest outweigh effects
39. Jessie W. Taylor (Re-issued with changes)	SC		12/28/98	Overrode State's Objection National interest outweigh effects
Mobil Oil Exploration & Producing Southeast, Inc. (Mobil Manteo) (Continuation of 33 and 34 after remand by Court)	NC		12/8/99	Did Not Override State Objection (declined to reopen record)
40.				

### Secretarial CZMA Decisions for OCS Oil and Gas Activities

There have been 14 Secretarial Decisions regarding OCS oil and gas Exploration Plans (EPs) and Development and Production Plans (DPPs), and OCS National Pollutant Discharge Elimination System permits (NPDES), issued by EPA. Of the 14 Decisions there has been:

- 7 decisions to override the State's objection, and
- 7 decisions not to override the State's objection.

These decisions, taken from the above table, are listed below:

<u>Appellant</u>	<u>EP, DPP, NPDES</u>	<u>State</u>	<u>Secretarial Decision</u>
Exxon (SYU)	DPP	California	Partial Decision for State (1984)
Union Oil	EP	California	Overrode State (1984)
Exxon (SRU)	EP	California	Did Not Override State (1984)
Gulf Oil	EP	California	Overrode State (1985)
Korea Drilling Co.	EP/NPDES	California	Overrode State (1989)
Texaco	EP/NPDES	California	Overrode State (1989)
Amoco	EP	Alaska	Overrode State (1990)
Chevron	EP/NPDES	California	Did Not Override State (1990)
Mobil (Pulley Ridge)	EP	Florida	Did Not Override State (1993)
Union Oil (Pulley Ridge)	EP	Florida	Did Not Override State (1993)
Chevron (Destin Dome)	EP	Florida	Overrode State (1993)
Mobil (2 cases) (Manteo)	EP/NPDES	North Carolina	Did Not Override State (1994)
Mobil (Pensacola)	EP	Florida	Overrode State (1995)
Mobil (Manteo) (not a separate decision, but a continuation of the two 1994 Mobil Manteo cases after remand by Court)	EP	North Carolina	Did Not Override State (1999) (declined to reopen record)